Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

Beryl Broyde; Mirel Broyde; David Cohen; Judith Cohen; Milton Duchan; Marion Duchan; Phillip D. Haack; Diane Hochberg; Helen Kuperman; Jerry T. Novetsky; Elliot Schoenig; Sarah Schoenig; Sharon K. Teasley; Robert L. Tilden; Samuel Tron and Doris Tron,

Petitioners

v.

Gotham Tower, Inc.; Bell Broadcasting Company; Marlin Broadcasting Company and Viacom International, Inc.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Federal Communications Act pre-empts petitioners' state law common-law nuisance claims.

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OPINIONS BELOW

The opinion below is styled *Broyde et al. v Gotham Tower, et al.*, 13 F3d 994 (6th Cir 1994).

GROUNDS FOR JURISDICTION

The opinion sought to be reviewed was filed January 14th 1994. No rehearing was sought or granted, nor any extension of time within which to file the petition for writ of certiorari.

Review is sought because the United States Court of Appeals decision in this case has decided a federal question in a way that conflicts with applicable 47 USC §414 decisions of the Supreme Court and is in conflict with the decisions of other United States Courts of Appeals on the same matter.

STATUTES and REGULATIONS

Michigan Statutes Annotated §27A.2940, (Michigan Compiled Laws §600.2940). **Claims based on or to abate nuisances.**

(1) All claims based on or to abate

nuisance may be brought in the circuit court. The circuit court may grant injunctions to stay and prevent nuisance.

(2) When the plaintiff prevails on a claim based on a private nuisance, he may have judgment for damages and may have a judgment that the nuisance be abated and removed unless the judge finds that the abatement of the nuisance is unnecessary.

28 USC §1331. **Federal Question**

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 USC §1441. **Actions removable generally**

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

475 USC §151. **Purposes; Federal Communications Commission created**

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, as far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this act.

47 USC §303 **Powers and duties of Commission**

(b) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate.

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act:...

47 USC §302a **Devices which interfere with radio reception**

(a) Regulations. The Commission may, consistent with the public interest, convenience, and necessity, make reasonable regulations (1) governing the interference potential of devices which in their operation are capable of emitting radio frequency by radiation, conduction, or other means in sufficient degree to cause harmful interference to radio communications; and (b) establishing minimum performance standards for home electronic equipment and systems to reduce their susceptibility to interference from radio frequency energy. Such regulations

shall be applicable to the manufacture, import, sale, offer for sale, or shipment of such devices and home electronic equipment and systems, and to the use of such devices.

47 CFR §73.310 FM technical definitions.

> Blanketing is that form of interference to the reception of other broadcast stations which is caused by the presence of an FM broadcast signal...

47 CFR §73.318 FM Blanketing interference.

Areas adjacent to the transmitting antenna that receive a signal with a strength of 115 dBu (562 mV/m) or greater will be assumed to be blanketed. In determining the blanketed area, the 115 dBu contour is determined by calculating the inverse distance field using the effective radiated power of the maximum radiated lobe of the antenna without considering its vertical radiation pattern or height. For

directional antennas, the effective radiated power in the pertinent bearing shall be used.

47 USC §414 **Exclusiveness of Act**

Nothing in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

STATEMENT OF THE CASE

Petitioners Beryl Broyde and 15 other individuals seek a Writ of Certiorari to the decision below, which affirmed a grant of summary judgment in favor of defendants in the United States District Court for the Eastern District of Michigan.

The subject matter of this case is a claim by residents in the city of Oak Park, Michigan that radio signals broadcast by four FM radio stations who concurrently broadcast from a single antenna tower owned by Gotham Tower, Inc. quite near their homes create conditions in their homes

which amount to a nuisance under the common law of Michigan. They commenced this suit in the state court of Michigan, alleging that conduct of the defendants constituted a nuisance as to them and seeking both damages at law and equitable relief. Defendants-respondents removed the case under 28 USC §1441 alleging that the case presented a federal question and that the United States court has jurisdiction under 28 USC §1331. The district court dismissed their cases on the grounds that plaintiffs' claims were pre-empted by the Federal Communications Commission Act, 47 USC §151 *et seq.*

The basis for federal jurisdiction in the US District Court was 28 USC §1331. Petitioners do not agree that there is federal jurisdiction here. They moved to remand which was denied.

Plaintiff-petitioners live or operate business in a certain area of Oakland County near the defendant FM stations' broadcast antennas, all of which are affixed to a structure known as the Gotham Tower. The signals from these stations, when combined together, interfere with

appliances and devices which are normal, even essential, attributes of modern urban life. In some instances things are activated or de-activated remotely by the interference; in other cases the item is rendered unusable by the signals. For example; plaintiffs expect to prove that the defendants cause excessively intense interference with television reception, telephones, garage door openers, recording devices, stereos and VCR's.

Plaintiffs are not broadcasters nor do they claim that there is any interference as between broadcasters. They do not claim that any licensed defendant is, by itself, causing them any problems. Rather, they claim that the signals broadcast by the station defendants together from the tower all of them use interferes with their use and enjoyment of their homes. They claim that those signals interfere with their use of telephones, television, recording devices, stereos, VCRs and cause electric garage doors to open and close "by themselves" to the detriment of their personal security, and other phenomena so bothersome to their quality of life that it constitutes a nuisance.

It is important to note what plaintiffs do not claim. They do not claim that the defendant stations interfere with any signals that plaintiffs wish to broadcast. They do not claim that defendants' transmissions interfered with or distorted the transmissions of other licensed FM stations. They only claim that conditions existing at defendants' point of broadcast interfere with their normal use and enjoyment of their homes or businesses.

Several plaintiffs have complained to the FCC but it asserted that it has no authority to act where the interference is not with another FM station.

Petitioners claim that these constitute a private nuisance *per accidens* as to them and sue to assert their common-law rights under that theory.

ARGUMENT

Petitioners' argument is organized around four main rules:

1. There is a presumption against pre-emption. Plaintiffs' claims are not pre-empted because federal law does not

pre-empt common law damages actions unless the congress specifically so mandates, which it has not done here.

2. The Federal Communications Commission Act has a savings clause, 47 USC §414, which preserves to plaintiffs their common-law remedies. This indicates that the U. S. Congress did not intend to occupy the entire field of radio broadcast litigation.

3. There is no federal pre-emption here because the state law is not an obstacle to accomplishing the purposes of congress. Compliance with both state common-law and federal law is possible, and desirable.

4. The federal law regulates between licensees, not between licensees and the petitioners. The federal law provides no remedy for them, especially as to their damages claims.

Petitioners' theory: common-law nuisance.

In *Kilts v Board of Supervisors of Kent County*, 162 Mich 646, 127 NW 821

(1910) the court said that a condition which:

> ...deprives his neighbor of the reasonable and comfortable enjoyment and use of his property, or which violates the unwritten but accepted law of decency, or which endangers or renders insecure the life and health of his neighbor is a nuisance. (162 Mich @ 652)

Nuisance is in Michigan a kind of "no-fault" tort. In *Buckeye Union Insurance Co. v. State of Michigan*, 383 Mich. 630, 178 NW 2d 476 (1970) a building owned by the state was held to have been a fire hazard nuisance to plaintiff's adjoining property. The court distinguished negligence cases from nuisance cases, and as to nuisance, defined it as follows; (p. 636).

> Primarily, nuisance is a condition. Liability is not predicated on tortious conduct through action or inaction on the part of those responsible for the condition. Nuisance may result from want of due care..., but may still exist as a dangerous, offensive or hazardous condition even with the best of care.

Plaintiff-appellants allege that radio transmissions from defendants' operations

cross over plaintiffs' properties at high levels of intensity which either exceed federal blanketing interference standards "...or are otherwise excessively intense." Their Complaint alleges that such transmissions by defendants "seriously and substantially interferes with the use and enjoyment of plaintiffs' property, and "...constitute a continuing nuisance ...and a nuisance *per se*."

Here there is a condition at defendants' facility which broadcasts a force which interferes with plaintiffs' use and enjoyment of their homes and businesses. They have a viable claim at common law in Michigan. The Michigan circuit court has jurisdiction to award damages and/or grant injunctions to stay nuisances, Mich. Stat. Ann. §27A. 2940, Mich Com. Laws §600.2940.

The issue is whether the federal government has taken that right away from them through the Federal Communications Act. It has not, as is explained within.

The presumption against pre-emption of common law remedies is not overcome by

congress here.

The controlling authority now on federal pre-emption of state law damage actions is *Cippolone v Liggett Group, Inc.*, 505 US _____, 112 S. Ct. 2608, 120 L Ed2d 407 (1992). This case holds that federal statutes do not pre-empt state court tort damage claims unless it is the clear intent of the congress to do so, and to provide an alternate remedy. The methodology for analysis of pre-emption questions is laid out.

The first rule is that there is a presumption against pre-emption. Every analysis of the pre-emption issue must begin with recognition of the underlying presumption against pre-emption. Consideration of pre-emption issues start with the assumption that the historic powers of the states are not to be superseded by federal act unless that is the clear and manifest intent of the congress, *Rice v Santa Fe Elevator Corp.*, 331 US 218, 67 S Ct 1160, 91 L Ed 1468 (1947).

The fact that state common-law damage

actions may incidentally regulate conduct by discouraging tortfeasance does not mean such actions are pre-empted by federal regulatory statutes, *Silkwood v Kerr-McGee Corp.*, 464 US 238, 104 S Ct. 615, 78 L Ed 2d 443 (1984). The court there also found it particularly significant that congress had failed to provide a federal remedy for those injured by conduct violating federal standards. *Id.* @ 623 ("It is difficult to believe that congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.") The incidental regulatory consequences of tort damage awards under state law was something that congress was willing to accept. If did not, then it is obliged to say so clearly. *Id.* @ 625.

Justice Blackmun, concurring in the *Cippolone* case said, "...we cannot find the state common-law damages claims at issue in this case pre-empted by federal law in the absence of clear and unambiguous evidence that congress intended that result." (120 L Ed 2d @ pg 442) The majority opinion reviews the logical progression analysis that must be used with every pre-emption

contention. At pg 420, the only three ways of overcoming the presumption against pre-emption are stated.

This presumption can be overcome only where there is either (1) express language in a federal statute saying so, or (2) federal law occupies the entire field of regulation leaving no room for state law, or (3) when compliance with both state and federal law is impossible [-or- that state law stands as an obstacle to accomplishing the purposes of congress.]

The Court of Appeals based its holding on the third ground, saying that there is, "...an irreconcilable conflict between the FCC's exercise of exclusive jurisdiction over the regulation of radio frequency interference and the imposition of common law standards in a damages action."

Because "The radio signal interference at issue falls within the FCC's technical domain." the presumption against pre-emption, it said, is overcome.

That is not a recognized basis for casting aside the presumption against pre-emption.

47 CFR §73.318 prescribes a numerical standard for "FM blanketing interference."

But "FM Blanketing" is defined in 47 CFR §73.310:

> Blanketing is that form of interference to the reception of <u>other broadcast stations</u> which is caused by the presence of an FM broadcast signal... (emphasis supplied)

Plaintiff-petitioners do not complain that any of these radio stations is blanketing any other broadcast station, but rather that together they are blanketing appliances, devices, communications and entertainment in their homes.

The Federal Regulations only address problems where FM stations' signals interfere with the reception of signals broadcast by other FM stations. There is no federal regulation of interference by FM signals with anything else. 47 CFR §73.318 describes a blanketed area as one which receives <u>a</u> signal with a strength above 115 dBu. Plaintiffs here receive several signals. Indeed, the Federal Communications Commission has declined to assist plaintiffs in resolving their problems, citing lack of authority. Plaintiffs do not seek to regulate interference between stations. That is the province of the FCC.

Plaintiffs seek compensation for interference between stations and themselves. That is beyond the scope of the FCC.

Federal law does not occupy the field, as shown by the savings clause.

A savings clause in the FCC Act shows that congress intended not to pre-empt the field. The courts may not substitute their intent to pre-empt instead.

In the *Cippolone* case the U.S. Supreme Court has sounded the death knell for judicial pre-emption: where congress "has included in the enacted legislation a provision explicitly addressing" pre-emption, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions." (120 L Ed 2d @ 423) In the instant case congress did explicitly address pre-emption.

The Federal Communications Commission Act contains a "savings clause at 47 USC §414 which reads:

> Nothing in this Act contained shall abridge or alter the remedies now existing at common

> law or by statute, but the provisions of the Act are in addition to such remedies.

This section of the statute clearly recognizes the existence of more, non-FCC, remedies. See, e.g., *Comtronics, Inc. v Puerto Rico Tel Co.*, 553 F2d 701, 708 (1977) (§ 414 preserves "causes of action for breaches of duties distinguishable from those created under the Act.") In order for there to be pre-emption there must be some explicit expression of the manifest intent of congress to obliterate state law remedies. The existence of the savings clause indicates that congress disclaimed any interest in promoting the development and utilization of FM radio frequencies "by means that fail to provide adequate remedies for those who are injured..." *Silkwood v Kerr-McGee Corp, supra* at 625. In *Cippolone, supra*, it has been made clear that courts may not veto state tort law under the guise of "implied pre-emption." Yet that is what the Court of Appeals has done here. It is in error.

Plaintiffs have whatever is saved for them at common law to assert in their behalf, and the common law is not pre-

empted.

The state common-law is not an obstacle to any congressional purpose. Compliance with both is possible.

The Court of Appeals found pre-emption anyway because it opined that the state law of nuisance conflicts with federal law. There are two reasons expressed for this. First, the court says, "The radio signal interference at issue here falls within the FCC's technical domain." "Technical domain" is not a recognized basis for federal pre-emption. State courts are perfectly capable of understanding technical matters as relate to private damage lawsuits. Consider the "technical domain" involved in several cases where pre-emption has been denied.

Papas v Zoecon Corp., ___ US ____, 112 S Ct 3020, 120 L Ed 2d 892 (1992) remanding to the 11th Circuit a case involving pesticide exposure. Organic chemistry and toxicology must have been involved, but this is no reason for federal pre-emption. Consider also *Couture v Dow Chemical U.S.A.*, 804 F Supp 1298 (D Mont 1992) and

Burke v Dow Chemical Co, 797 F Supp 1128 (ED NY 1992) [herbicides, organic chemistry, not pre-empted by FIFRA]. *Margolis v United Airlines, Inc.*, 811 F Supp 318 (ED MI 1993) and *Cleveland v Piper Aircraft Corp.*, 985 F2d 1438 (10th Cir 1993) involved the "technical domain" of aeronautical engineering and maintenance, yet it was held there was no pre-emption by the Federal Aviation Act. The FAA contains a savings clause (49 USC §1305(a)) identical to the one in the Federal Communications Commission Act.

In *Silkwood v Kerr-McGee, supra*, there was no federal pre-emption despite the case involving the technical domain of radioactive radiation hazards. The F.C.C. itself has declined to pr-empt all state and local regulation in areas falling within its "technical domain" even when presented opportunities to do so. For example, the F.C.C. declined a request to pre-empt "all local ordinances which provably preclude or significantly inhibit effective reliable amateur radio communications." The F.C.C. determined that "a reasonable accommodation may be made

between legitimate local interest in regulating the health, safety and general welfare of the community and the federal interest in promoting amateur radio operations," and held that local regulations involving placement, screening, or height of antennas based on health, safety or aesthetic amateur communications are not pre-empted. *In the Matter of Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities*, 1001 F.C.C. 2d 952 (1985) @ 959-960.

Simply because evidence in a case may fall with the "technical domain" of some federal regulatory agency is not a recognized basis for federal pre-emption. Such a rule would pre-empt almost everything in modern society.

Also, the Court of Appeals held that because a Conference Report by the congress expressed a belief that, "...radio transmitter operators should not be subject to fines, forfeitures, or other liability imposed by any local or state authority as a result of interference appearing in home electronic equipment or systems.", 1982

U.S. Code Cong. & Ad. News 2267, plaintiffs case is pre-empted by federal law. This is the most dangerous part of the opinion below.

It is legislation by committee. The court below would imply pre-emption from a committee report, bootstrapping that report into the law of the land. Where statutory language is plain and unambiguous, it meaning is discerned from the statutory text alone and not from the statements of individual legislators or committees. *West Virginia University Hospitals, Inc. v Casey*, ____ US ____, 111 S Ct 1138, 1147, 113 L Ed 2d 68 (1991). There is nothing in the amendatory language expressly repealing the savings clause. The statute (47 USC §302a) authorizes the regulation of things which emit radio energy (which plaintiffs do not do) and the setting of standards for the manufacture of home electronics to reduce their susceptibility to radio energy. (Plaintiffs don't do this either.) The statute does not say what remedies are provided if the emissions are excessive and the home electronics still susceptible. The statute does not say what the conferees

believed. It does not expressly pre-empt local or state liability. The savings clause has not been repealed.

To hold that the common-law nuisance claims are pre-empted on the basis of a committee report violates the "cardinal rule" against repeal by implication in *Tennessee Valley Authority v Hill*, 437 US 190, 98 S Ct 2299, 57 L Ed 2d 117 (1978).

There is no clear and unambiguous language in the statute that congress intended to pre-empt state law nuisance damage claims. The committee comments are not, "...in the enacted legislation..." as required by the *Cippolone* rule (120 L Ed 2d @ 423). The courts must follow statutes enacted by congress, but for the courts to adopt as federal law a report issued by only a committee of congress, and hold that to be a manifest intent to obliterate state law remedies, is implied pre-emption by the courts of precisely the kind forbidden by *Cippolone*.

Respondents must comply with federal regulation and can also pay damages claims if they create a nuisance, without upsetting any grand regulatory scheme. It

merely gives them an option, a choice of behavior as described by Justices Blackmun, Kennedy and Souter in *Cippolone*, 120 L Ed 2d @ 435.

There is no other forum for petitioners.

Lastly, the Court of Appeals said that plaintiffs are not left without a forum. It held that plaintiff can file petitions within the FCC to resolve their complaints. This holding conflicts with decisions by other United States courts of appeals on the same issue.

Except for certain actions against common carriers[1], the Federal Communications Act does not expressly authorize private enforcement actions or citizens' suits. Federal courts which have considered the question have generally held that the act does not confer an implied private cause of action for either damages or injunctive relief. *New England Telephone*

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[1] See sections 206 and 207 of the Federal Communications Act, 47 USC 206 & 207.

& Telegraph Co. v Public Utilities Comm'n, 565 F Supp 949, 955-956 (1983). These courts have reasoned that congress simply did not intend to create any private remedies other than those explicitly set forth in the act because congress vested regulatory and criminal enforcement of the act in the FCC. *Lechtner v Brownyard*, 679 F2d 322, 325 (3d Cir 1982). See also *Schnapper v Foley*, 667 F2d 102, 116 (DC Cir 1981) cert den 102 S Ct 1448; *Belluso v Turner Communications Corp.*, 633 F2d 393, 397 (5th Cir 1980), *Daley v Columbia Broadcasting System, Inc.*, 309 F2d 83, 86,(7th Cir 1962); *Ahmad v Levi*, 414 F Supp 597, 603 (ED Pa 1976); *Post v Payton*, 323 F Supp 799, 802 (ED NY 1971) and *Ackerman v Columbia Broadcasting System, Inc.*, 301 F Supp 628, 631 (SD NY 1969), all cited in *Lechtner, supra.* Whatever private causes of action exist are those saved by section 414.

And even the court below does not suggest that the FCC can assess and grant damages at law for the nuisance inflicted up to now. Under state law petitioners can claim these.

In *Cippolone* it was held that the word "regulation" refers to positive statutory enactments by state legislatures, etc., not to common-law damages actions. "There is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions." (120 L Ed 2d @ 424.)

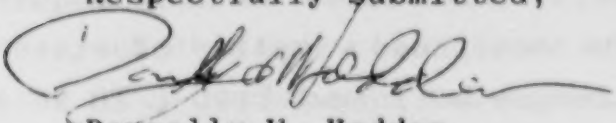
What we have in this *Broyd* case is a situation where state law occupies a field not touched upon by federal law and where the state common law provides sanctions for behavior not regulated by federal law, and different from any under federal law. A state may do this. A claim based upon such state law is not pre-empted.

CONCLUSION

Petitioners have stated causes of action under state law that are not pre-empted by federal statutes. The Court of Appeals decision conflicts with opinions of the Supreme Court and with those of other courts of appeal. The court below implied pre-emption, which it is forbidden to do,

from a committee report. This is erroneous and dangerous precedent. Petitioners respectfully request that this court grant a writ of certiorari in this matter.

Respectfully submitted,



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April 7, 1994

APPENDIX

1. Opinion of the United States Court of Appeals for the Sixth Circuit.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1994 FED App. 0007P (6th Cir.)
File Name: 94A0007P.06

No. 92-2395

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BERYL BROYDE; MIREL BROYDE; DAVID COHEN; JUDITH COHEN; NATHAN COHEN; MILTON DUCHAN; MARION DUCHAN; PHILIP D. HAACK; DIANE HOCHBERG; ICEK KUPERMAN; HELEN KUPERMAN; JERRY J. NOVETSKY; ELLIOT SHOENIG; SARAH SHOENIG; SHARON K. TEASLEY; ROBERT L. TILDEN; SAMUEL TRON; and DORIS TRON,
Plaintiffs-Appellants,

v.

GOTHAM TOWER, INC; BELL BROADCASTING COMPANY; HOKER BROADCASTING, INC.; MARLIN BROADCASTING COMPANY; and VIACOM INTERNATIONAL, INC.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan

Decided and Filed January 14, 1994

Before: MARTIN and BOGGS, Circuit Judges; and HULL, District Judge.*

BOYCE F. MARTIN, JR., Circuit Judge. In this action predicated on common law nuisance, the plaintiffs, all residents of Oak Park, Michigan, allege that the defendants' radio signals interfere with the operation of home electronic equipment, thereby disrupting the plaintiffs' use and enjoyment of their property. Plaintiffs now appeal from an order of the district court dismissing their complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. For the following reasons, we affirm the district court.

Defendant Gotham Tower, Inc. operates an eight-hundred-foot tall radio tower in Oak Park from which defendants Bell Broadcasting Company, Marlin Broadcasting Company, and Viacom International, Inc. transmit FM radio signals. The Federal Communications Commission granted the defendants licenses to broadcast from this location and now regulates the frequency, timing, and power of the defendants' transmissions.

The plaintiffs, residents of a nearby neighborhood, claim that the radio signals broadcast from Gotham Tower cross their property, leaving behind a wake of malfunctioning household appliances. The plaintiffs allege that these signals interfere with television and radio reception,

*The Honorable Thomas G. Hull, United States District Judge for the Eastern District of Tennessee, sitting by designation.

activate garage door openers, and render certain telephones, stereos, and recording devices unusable. Maintaining that the intensity of the defendants' signals "regularly exceed[s] the federal standard for F.M. blanketing interference," the plaintiffs filed suit on common law nuisanee grounds in Oakland County Circuit Court on July 7, 1992. In their complaint, the plaintiffs sought both injunctive relief and damages.

On July 27, the defendants removed the case to federal district court and, shortly thereafter, moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Specifically, the defendants contended that the Federal Communications Act of 1934, 47 U.S.C. §§ 151-613, preempts the plaintiffs' nuisance claim.

In reaching its decision, the district court first noted the consistent finding of preemption by all courts that have considered the interaction of common law nuisance claims and the Federal Communications Act. *See Still v. Michaels*, 791 F. Supp. 248 (D. Ariz. 1992) (nuisance action preempted by Federal Communications Act); *Still v. Michaels*, 803 P.2d 124 (Ariz. 1990) (FCC has exclusive jurisdiction over resolution of radio signal interference nuisance claims); *Smith v. Calvary Educational Broadcasting Network*, 783 S.W.2d 533 (Mo. Ct. App. 1990) (Federal Communications Act preempts state nuisance action based on radio signal interference with electrical appliances); *Blackburn v. Doubleday Broadcasting Co., Inc.*, 353 N.W.2d 550 (Minn. 1984) (radio transmission nuisance claims under exclusive jurisdiction of FCC). The district court then held that judicial resolution of the plaintiffs' nuisance claim would be inconsistent with the FCC's exercise of exclusive jurisdiction over the broadcast industry. On October 21, the district court dismissed the plaintiffs' case. The plaintiffs, in turn, filed this timely appeal.

In this Court, a "motion under Rule 12(b)(6) tests whether a claim has been adequately stated in the

complaint. The basic requirements for a pleading are set out in Rule 8(a) and call for 'a short and plain statement of the claim showing that the pleader is entitled to relief.' In considering a Rule 12(b)(6) motion, the court must accept as true all factual allegations in the complaint." *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277, 279 (6th Cir. 1987) (en banc) (citations omitted). A Rule 12(b)(6) motion should only be granted if "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976). Here, the plaintiffs assert that the Supreme Court's recent opinion in *Cipollone v. Liggett Group, Inc.*, __ U.S. __, 112 S.Ct. 2608, 120 L.Ed. 2d. 407 (1992), alters federal preemption analysis, authorizes their common law nuisance suit, and mandates reversal of the district court's grant of defendant's Rule 12(b)(6) motion. We are not persuaded.

Initially, plaintiffs note correctly that *Cipollone* reaffirms the presumption against federal preemption of state law. The Court's opinion, limited to consideration of the Federal Cigarette Labeling and Advertising Act and the Public Health Cigarette Smoking Act of 1969, held that the legislation did not preempt certain state law damage actions. *Cipollone*, 112 S.Ct. at 2625. In reaching this conclusion, the Court emphasized that Congress' enactment of provisions in the legislation explicitly defining the preemptive reach of the statutes meant that "matters beyond that reach are not pre-empted." *Cipollone*, 112 S.Ct. at 2618. The Court noted, however, that absent such a specific preemption provision, it would turn to an implied preemption analysis. *Id.* As the Court's opinion recognized, "[i]n the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Id.* at 2617 (citations omitted).

Such an implied preemption analysis is appropriate here. The Federal Communications Act does not contain an explicit provision defining the legislation's preemptive scope that limits this Court's inquiry. Rather, this Court is required to determine whether the plaintiffs' state law nuisance action actually conflicts with the Act or if plaintiffs' claim is necessarily displaced because the Act fully occupies the field.

The plaintiffs raise four challenges to the district court's judgment that the Federal Communications Act preempts common law actions to remedy a nuisance caused by radio signals. First, the plaintiffs assert that there is no language in the Act that expressly preempts state nuisance suits. Next, the plaintiffs claim that the Act's savings clause, 47 U.S.C. § 414, demonstrates clear congressional intent to preserve state claims and, thus, that the Act does not occupy the field. Third, the plaintiffs maintain that there is no actual conflict between the provisions of the Act and their common law nuisance action. Finally, the plaintiffs contend that they are entitled to bring their nuisance action to enforce state standards that exceed the obligations imposed upon defendants under the Act.

This Court has carefully considered each of the plaintiffs' arguments. Resolution of this matter, however, turns on a single issue: the existence of an irreconcilable conflict between the FCC's exercise of exclusive jurisdiction over the regulation of radio frequency interference and the imposition of common law standards in a damages action. As the Supreme Court recognizes, the FCC's jurisdiction "over technical matters" associated with the transmission of radio signals "is clearly exclusive." *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 430 n.6 (1963); *cf. In Re Long Distance Telecommunications Litigation*, 831 F.2d 627, 633 (6th Cir. 1987) (state law claims for fraud and deceit are not preempted by the Communications Act because they fall "within the conventional experience of judges" and "do not require agency expertise for their treatment"). The radio signal

interference at issue here falls within the FCC's technical domain.

To promote exclusive FCC jurisdiction over radio signal interference with home appliances and systems, the Act empowers the FCC to adopt regulations "establishing minimum performance standards for home electronic equipment and systems to reduce their susceptibility to interference from radio frequency energy." 47 U.S.C. § 302a (a)(2). In ratifying section 302a in 1982, the Conference Report emphasized that the amendments were:

> intended to clarify the reservation of exclusive jurisdiction to the Federal Communications Commission over matters involving RFI [radio frequency interference]. Such matters shall not be regulated by local or state law, nor shall radio transmitting apparatus be subject to local or state regulation as part of any effort to resolve an RFI complaint. The Conferees believe that radio transmitter operators should not be subject to fines, forfeitures, or other liability imposed by any local or state authority as a result of interference appearing in home electronic equipment or systems. Rather, the Conferees intend that regulation of RFI phenomena shall be imposed only by the Commission.

1982 U.S. Code Cong. & Ad. News 2267. Given such explicit congressional pronouncements, enforcement of the plaintiffs' state law nuisance action would frustrate the objectives of the Act. Accordingly, the district court properly granted defendants' Rule 12(b)(6) motion.

The plaintiffs are not, however, left without a forum in which to raise their radio frequency interference complaints. The residents may lodge informal written complaints, specifically setting forth the nature and duration of the interference, with the Gotham Tower stations, the local FCC field office, and the FM Branch of the Mass Media Bureau. *See In Re Application of Calvary Educational Broadcasting Network, Inc.*, 7 F.C.C.R. 4037 (1992) (noting that FCC action followed the filing by local

residents of more than nine hundred blanketing interference complaints); 47 C.F.R. § 1.41 (1992). The residents may also file petitions to deny any license or renewal applications filed with the FCC by the Gotham Tower stations. 47 U.S.C. § 309(d); 47 C.F.R. § 73.3584 (1992); *see also In Re Application of Calvary Educational Broadcasting Network, Inc.*, 7 F.C.C.R. 4037 (1992) (designating station's application for renewal of license for evidentiary hearing after local residents filed petitions to deny). After taking such steps, moreover, the plaintiffs will have an opportunity to pursue federal court review of their claims. Under the Act, aggrieved parties may seek review of decisions and orders of the FCC in the United States Court of Appeals for the District of Columbia Circuit. 47 U.S.C. § 402(b); *see also FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984).

For the foregoing reasons, the judgment of the district court is affirmed.

2. Affidavit of Petitioner Jerry Novetsky filed below.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BERYL BROYD *et al.*,
Plaintiffs

vs. No. 92 CV 74176 DT
Hon. Lawrence Zatkoff

GOTHAM TOWER, INC. *et al.*,
Defendants.
_____/

AFFIDAVIT OF JERRY NOVETSKY

State of Michigan)
) ss
County of Washtenaw)

JERRY NOVETSKY being first duly sworn deposes and says:

1. I am a plaintiff in this cause.

2. On many occasions during 1990 I complained to the Federal Communications

Commission about interference from Gotham Tower stations with various electric and electronic devices and appliances in my home. I spoke many times on the telephone with Mr. James A. Bridgewater, Electronic Engineer, Enforcement Division, Federal Communications Commission Field Operations Bureau, 24897 Hathaway St., Farmington Hills, MI 48331-1398. On one occasion Mr. Bridgewater came to my home to investigate, and acknowledged the problems.

3. Mr. Bridgewater stated repeatedly that there is, "...nothing the FCC can do about your problem." and stated that it is not the function of the FCC to resolve these kinds of problems. He said, "It is not the function of the FCC to help individuals who have interference from stations, only where other transmitters have interference."

4. The FCC has done nothing to

resolve my complaints about these stations. It has taken no action regarding them. It has taken no action regarding the other complaints either.

s/_____
Jerry Novetsky

Subscribed and sworn to before
me this 9th day of October, 1992.

s/_____
Genevieve Greenfield, Notary Public
Washtenaw County, Michigan
My Commission Expires: 12-6-95

Supreme Court, U.S.
FILED
931619 APR 8 1994
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

Beryl Broyde; Mirel Broyde; David Cohen; Judith Cohen; Milton Duchan; Marion Duchan; Phillip D. Haack; Diane Hochberg; Helen Kuperman; Jerry T. Novetsky; Elliot Schoenig; Sarah Schoenig; Sharon K. Teasley; Robert L. Tilden; Samuel Tron and Doris Tron,

Petitioners

v.

Gotham Tower, Inc.; Bell Broadcasting Company; Marlin Broadcasting Company and Viacom International, Inc.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

DONNELLY W. HADDEN, P.C.
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11pp

3. Memorandum Opinion and Order of the United States District Court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BERYL BROYDE, MIREL BROYDE, DAVID COHEN, JUDITH COHEN, NATHAN COHEN, MILTON DUCHAN, MARION DUCHAN, PHILIP HAACK, DIANE HOCHBERG, ICEK KUPERMAN, HELEN KUPERMAN, JERRY NOVETSKY, ELLIOT SHOENIG, SARAH SHOENIG, SHARON TEASLEY, ROBERT TILDEN, SAMUEL TRON and DORIS TRON

Plaintiffs,

vs. CASE NO. 92-CV-74276-DT
HON. LAWRENCE P. ZATKOFF

GOTHAM TOWER, INC., a Michigan corporation, BELL BROADCASTING COMPANY, a Michigan Corporation, HOKER BROADCASTING COMPANY, a defunct Michigan corporation, MARLIN BROADCASTING COMPANY, a Delaware corporation, and VIACOM INTERNATIONAL, INC., a Delaware corporation, jointly and severally.

Defendants.
_____/

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of

Detroit, State of Michigan, on the 21st day of October, 1992

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

This matter is before the Court on defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiffs have since responded.[1] Accordingly, it is hereby ORDERED that defendants' motion will be resolved without oral hearing. E.D. Mich. LR 7.1(e)(2). For the reasons that follow, defendants' motion is GRANTED.

FACTS

Defendant Gotham Tower, Inc. is a Michigan corporation which controls and operates an 800 foor radio tower at 24600 Greenfield Road, Oak Park, Michigan. The tower serves as a transmitting antenna for four FM radio stations. Those stations are

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[1] Plaintiffs have also filed a motion for remand. In light of this opinion, however, that motion is MOOT.

owned by the other named defendants, Bell Broadcasting Company, Hoker Broadcasting Company, Marlin Broadcasting Company and Viacom International, Inc.

Plaintiffs are individuals who reside in Oak Park. They contend that the transmission of radio signals by the stations utilizing Gotham Tower "cause radio frequency radiation to cross over plaintiffs' property at high levels of intensity which regularly exceed the federal standard for F. M. blanketing interference. . . ." Plaintiffs' Complaint, p. 3. According to plaintiffs, this results in "serious and continuous interference with radio and television reception at [their] homes, and serious and continuous interference with . . . other home electronic equipment such as telephones, garage door openers, recording devices, stereos, and VCR's [sic]. Id.

Plaintiffs' thus brought suit in Oakland County Circuit Court seeking injunctive relief and damages. Their claim is predicated on common law nuisance.

On July 27, 1992, defendants filed notice of removal to this Court. They maintain that the nuisance claim is preempted by the Federal Communications Act of 1934 ("FCA"), 47 U.S.C. §§ 151-613. Consequently, since this Court would have original jurisdiction under 28 U.S.C. § 1331, the case was properly removed pursuant to 28 U.S.C. § 1441. Defendant now moves to dismiss on the grounds that plaintiffs' complaint does not state a claim upon which relief can be granted.

STANDARD OF REVIEW

A Fed. R. Civ. P. 12(b)(6) motion requires courts to determine whether legally cognizable claims have been plead. All factual allegations in the complaint

must be accepted as true, and the motion must be denied unless it appears beyond doubt that the non-movant can prove no set of facts which would permit relief. Windsor v. The Tennessean, 719 F.2d 155, 158 (6th Cir. 1983), cert. denied, 469 U.S. 826 (1984).

OPINION

The issue before this Court is a narrow one: Whether the FCA preempts plaintiffs' state law nuisance claims? If so, plaintiffs' complaint must be dismissed.

Several courts, both state and federal, have addressed this question. All have reached the same result. Perhaps the most persuasive is Blackburn v. Doubleday Broadcasting Co., 353 N.W.2d 550 (Minn. 1984). In Blackburn, the plaintiffs were individuals who lived or worked in the Minneapolis, Minnesota area. They claimed

that several radio stations which broadcasted atop a particular tower interfered with or distorted their reception of other radio stations. The plaintiffs claimed that the distortion constituted an actionable nuisance under Minnesota law. The Minnesota Supreme Court disagreed. In reaching its decision, the court noted that the FCA constitutes "a plenary exercise of the federal government's power to occupy and regulate the broadcast industry." Id. at 551. Pursuant to the Act, Congress delegated comprehensive powers to the Federal Communications Commission ("FCA") to administer a unified and comprehensive regulatory scheme for the industry. Id. at 551-52 (citing Federal Communication Comm'n v. Pottsville Broadcasting Co., 309 u.s. 134, 137 (1940)). In carrying out its duties, the FCC is authorized to "[m]ake

such regulations not inconsistent with law as it may deem necessary to prevent interference between stations. . . ." 47 U.S.C. § 303(f). The court then considered whether enforcement of a nuisance claim with respect to interference would be inconsistent with the delegation of authority to the FCC.

In holding that it would, the court stated that "[t]o resolve [a nuisance] claim, the state court would be required to determine just what level of interference, if any, is inappropriate. . . . That, however, is precisely the subject matter which lies within the exclusive regulatory jurisdiction of the FCC. It is quite apparent, therefore, that the state court may reach results which conflict with the regulations imposed . . . by the FCC." Id. at 555-56. This, the court noted, is irreconcilable with Congress' expressed

intent that the FCC should exercise exclusive jurisdiction over regulating this subject matter. Id. at 556. Given this clash, the court ruled that the plaintiffs' nuisance claims were preempted. Accord Still v. Michaels, 166 Ariz. 403, 404 (1991) (affirming the dismissal of plaintiffs' nuisance action on the basis that the FCC has exclusive jurisdiction over matters concerning interference); Smith v. Calvary Educ. Broadcasting Network, 783 S.W.2d 533, 537 (Mo. CT. App. 1990) (affirming trial court's dismissal of plaintiffs' nuisance claim for interference with property owners' use of electrical and electronic appliances because of FCA preemption).

This Court agrees with the rationale of Blackburn. Accordingly, plaintiffs' nuisance claims are preempted, and the complaint fails to state a claim upon which

relief can be granted.

CONCLUSION

For the reasons set forth above, defendants' motion is GRANTED. Plaintiffs' complaint is hereby DISMISSED.

IT IS SO ORDERED.

/s/_____
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

BERYL BROYDE, et al.,

Plaintiffs,

vs. CASE NO. 92-CV-74276-DT
HON. LAWRENCE P. ZATKOFF

GOTHAM TOWER, INC.,
a Michigan corporation, et al.,

Defendants.
_____/

J U D G M E N T

IT IS ORDERED AND ADJUDGED that this action is hereby DISMISSED pursuant to the Memorandum Opinion and Order dated October 21, 1992.

Dated at Detroit, Michigan, this 21st day of October 1992.

JOHN P. MAYER
CLERK OF COURT

/s/_____

APPROVED:

/s/_____
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

No. 93-1619

Supreme Court, U.S.
FILED
MAY 6 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

BERYL BROYDE, MIREL BROYDE, DAVID COHEN, JUDITH COHEN, MILTON DUCHAN, MARION DUCHAN, PHILLIP D. HAACK, DIANE HOCHBERG, HELEN KUPERMAN, JERRY J. NOVETSKY, ELLIOT SCHOENIG, SARAH SCHOENIG, SHARON K. TEASLEY, ROBERT L. TILDEN, SAMUEL TRON and DORIS TRON,

Petitioners,

vs.

GOTHAM TOWER, INC., BELL BROADCASTING COMPANY, MARLIN BROADCASTING COMPANY and VIACOM INTERNATIONAL, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS BELL BROADCASTING COMPANY AND MARLIN BROADCASTING COMPANY

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QUESTION PRESENTED FOR REVIEW

Whether this Court should deny certiorari to the United States Court of Appeals for the Sixth Circuit, which ruled that the Federal Communications Act preempts petitioners' common law nuisance claim that respondents' radio broadcast signals interfere with petitioners' radio and television reception and with the operation of electronic equipment in petitioners' homes, where: (1) the Sixth Circuit did not decide a federal question in a way that conflicts with applicable decisions of this Court, (2) the decision of the Sixth Circuit is not in conflict with any decision of a United States Court of Appeals, and (3) the decision of the Sixth Circuit is in accord with the one other federal court and all state court decisions on the same issue?

STATEMENT PURSUANT TO RULE 29.1

There are no parent companies or subsidiaries (excluding wholly owned subsidiaries) of either Bell Broadcasting Company or Marlin Broadcasting Company.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. i) is reported at 13 F.3d 994 (6th Cir. 1994). The opinion of the United States District Court for the Eastern District of Michigan (Pet. Supp. App.) is unreported.

STATEMENT OF THE CASE

Respondents are three FCC-licensed FM radio broadcasters (Bell Broadcasting Company, Marlin Broadcasting Company and Viacom International, Inc.), all located at and transmitting from a tower owned and operated by respondent Gotham Tower, Inc. Federal Communications Commission ("F.C.C.") licenses regulate the frequency, power and location of respondents' signals. 47 U.S.C. § 303.

Petitioners' complaint, filed in state court, alleged that respondents' transmission of FM radio signals constitutes a common law nuisance because the radio signals interfere with radio and television reception in petitioners' homes and with the operation of home electronic equipment such as telephones, garage door openers and VCR's. (Complaint, R. 1, ¶¶ 9, 10.) According to petitioners, respondents transmit FM radio signals that "regularly exceed the federal standard for FM blanketing interference or [are] otherwise excessively intense.[1] (*Id.*,

[1] "FM Blanketing" is defined in 47 C.F.R. § 73.310 as: [T]hat form of interference to the reception of other broadcast stations which is caused by the presence of

¶ 9.) Petitioners sought monetary damages and equitable relief. (*Id.*, Count I, p. 4; Count II, p. 5.)

Respondents removed the action to the United States District Court for the Eastern District of Michigan and moved to dismiss for failure to state a claim upon which relief can be granted. The district court granted respondents' motion to dismiss on the ground that petitioners' action is preempted by the Federal Communications Act of 1934, 47 U.S.C. §§ 151-613. (Pet. Supp. App., pp. 8-9.) The United States Court of Appeals for the Sixth Circuit affirmed. It noted, however, that petitioners may pursue their claims for radio frequency interference with the F.C.C. (Pet. App. i, p. 6.)

As required by Rule 15.1 of this Court, respondents point out the following misstatement of fact appearing in the petition. The petition asserts at Pet., pp. 14, 21, that the F.C.C. made certain representations to petitioners; at Pet. App., p. ii[sic], petitioners attach a hearsay affidavit which purports to attest to the fact and substance of such communication. Neither the statement nor the affidavit was part of petitioners' complaint, neither was considered by the district court or Court of Appeals in deciding or reviewing the decision on respondents' 12(b)(6) motion, *see* Pet. App. i, *and* Pet. Supp. App., and neither is properly before this Court.

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an FM broadcast signal of 115 dBu (562 mV/m) or greater signal strength in the area adjacent to the antenna of the transmitting station. The 115 dBu contour is referred to as the blanketing contour and the area within this contour is referred to as the blanketing area.

Pursuant to Rule 15.1, respondents further point out the petition's following misstatements of law. The petition asserts, at Pet., p. 21, that:

> [T]he Federal Regulations only address problems where FM stations' signals interfere with the reception of signals broadcast by other FM stations. There is no federal regulation of interference by FM signals with anything else.

The petition also sets out the text of the introductory paragraph of 47 C.F.R. § 73.318. (Pet., pp. 10-11.)

Subsections (b), (c) and (d) of 47 C.F.R. § 73.318, which the petition does not cite, regulate interference by FM signals with residential radio and television receivers. *See In re Application of Calvary Educ. Broadcasting Network, Inc.*, 7 F.C.C.R. 4037 (1992).

SUMMARY OF ARGUMENT

Although petitioners claim to seek review for two of the reasons under Rule 10.1 (Pet., p. 6), the petition does not support either one. The first ground claimed is that the decision below "conflicts with applicable 47 U.S.C. § 414 decisions of the Supreme Court. . . . " Yet, the petition cites no such Supreme Court decisions. There is no such conflict.

The second ground claimed is that the decision below "is in conflict with the decisions of other United States Courts of Appeals on the same matter." Again, the petition nowhere cites any such decisions. There is no such conflict. There are only four decisions "on the same matter" as petitioners' "Question Presented for Review," one

by a federal district court and three by state appellate courts. All are in accord with and cited in the decision below; none is cited in the petition.

What the petition really argues are the merits of petitioners' case – why they believe their state law nuisance claim about radio frequency interference is not preempted by the Federal Communications Act. Nowhere does the petition suggest any reason why this Court should consider the matter. Moreover, each of petitioners' arguments on the merits is answered cogently and correctly by the lower court decision.

REASONS FOR DENYING THE PETITION

I. NEITHER OF THE PURPORTED "CONFLICTS" CLAIMED AS REASONS FOR SEEKING REVIEW IS SUPPORTED BY THE PETITION.

A. The Petition Cites No "47 U.S.C. § 414 Decisions Of The Supreme Court," Much Less Any Which Conflict With The Decision Below.

Petitioners' first stated ground for review by this Court is that the decision below "decided a federal question in a way that conflicts with applicable 47 U.S.C. § 414 decisions of the Supreme Court. . . . " (Pet., p. 6.) The petition, however, does not cite or identify a single decision of this Court as a "47 U.S.C. § 414 decision."

Section 414 of the Federal Communications Act (Pet., p. 11), the statute's "savings clause," appears to have been cited by this Court in only two opinions, neither of which is cited in the petition or is in conflict with the

lower court decision. In *Teleprompter Corp. v. Columbia Broadcasting System*, 415 U.S. 394 (1974), an action by owners of copyrighted television programs for copyright infringement, there was no preemption claim. The Court merely recognized in a footnote that the F.C.C.'s position that it is without power to alter rights emanating from sources, including the Copyright Act, other than the Federal Communications Act, is consistent with the language of § 414. *Id.*, at 406 n.11.

In *Head v. New Mexico Bd. of Examiners In Optometry*, 374 U.S. 424, 443-44 (1963), relied on by the court below for the proposition that this Court recognizes that "the FCC's jurisdiction 'over technical matters' associated with the transmission of radio signals 'is clearly exclusive' " (Pet. App. i, p. 5, *citing* 374 U.S. 424, 430 n.6), the concurring opinion cites § 414.

The decisions of this Court upon which petitioners do rely present no conflict, either. Neither *Cippolone v. Liggett Group, Inc.*, 505 U.S. ___, 112 S. Ct. 2608 (1992), which was fully considered by the Circuit Court below (Pet. App. i, pp. 4-5), nor *Papas v. Zoecon Corp.*, ___ U.S. ___, 112 S. Ct. 3020 (1992), nor *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), nor *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), nor *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), nor *West Virginia Univ. Hosp. Inc. v. Casey*, 499 U.S. 83 (1991) interprets or involves 47 U.S.C. § 414.[2]

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[2] The one Court of Appeals opinion cited by petitioners which discusses 47 U.S.C. § 414, *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d 701, 708 (1st Cir. 1977), is not in conflict with the decision below, either. The *Comtronics* court's holding *affirming dismissal* of a damages action against a telephone company which refused to connect the plaintiff's equipment to

The claimed conflict between the decision below and "applicable 47 U.S.C. § 414 decisions of the Supreme Court" does not exist.

B. The Petition Cites No United States Court Of Appeals Decisions Which Conflict With The Decision Below, Which Decision Is In Accord With Decisions Of Other Courts On The Same Issue.

Although petitioners' second stated ground for review is that the decision by the Sixth Circuit "is in

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the company's lines did not involve an analysis of § 414. Instead, it was based upon "a clear legislative intent to preclude such a remedy," 553 F.2d 705, and on the fact that "*Congress has subjected [the defendant's] actions as a carrier to the detailed regulatory scheme of the Communications Act.*" *Id.*, at 207 (emphasis added). The court expressed its view of § 414 in a footnote, only a portion of a sentence of which is quoted in the petition. Correctly quoted, as follows, the *Comtronics* court supports the Sixth Circuit's reasoning in holding petitioners' action involving radio frequency interference preempted:

> [W]e read § 414 as preserving causes of action for breaches of duties distinguishable from those created under the Act, *as in the case of a contract claim.*

553 F.2d at 708 (emphasis added). In contrast to the hypothetical breach of contract claim which the *Comtronics* court would allow, the complaint below did allege a breach of duty created under the Federal Communications Act. Petitioners' claim would impose liability for:

> radio frequency radiation . . . at high levels of intensity which regularly exceed the federal standard for FM blanketing interference.

(Complaint, R. 1, ¶ 9.) That is, the complaint alleged actions by the respondent broadcasters which Congress has subjected to "the detailed regulatory scheme of the Communications Act." *Comtronics, Inc.*, 553 F.2d at 207.

conflict with the decisions of other United States Courts of Appeals on the same matter" (Pet., p. 6), petitioners do not cite a single United States Court of Appeals decision allowing a private nuisance claim for radio signal interference. Nor has any such decision come to the attention of respondents. Instead, as the decision below observed, "*all courts* that have considered the interaction of common law nuisance claims and the Federal Communications Act" (Pet. App. i, p. 3, emphasis added) have made a "consistent finding of preemption." (*Id.*) The decisions of those courts are cited in the opinion below (Pet. App. i, p. 3) and include the only federal decision which considers a claim like that of petitioners, *Still v. Michaels*, 791 F. Supp. 284 (D. Ariz. 1992) (common law nuisance claims based on radio frequency interference are preempted by the Federal Communications Act), and decisions from three state appellate courts: *Still v. Michaels*, 803 P.2d 124 (Ariz. 1990) (the F.C.C. has exclusive jurisdiction over resolution of radio signal interference nuisance claims); *Smith v. Calvary Educ. Broadcasting Network*, 783 S.W.2d 533 (Mo. App. 1990) (the Federal Communications Act preempts a state nuisance action based on radio signal interference with electrical appliances); and *Blackburn v. Doubleday Broadcasting Co.*, 353 N.W.2d 550 (Minn. 1984) (radio transmission nuisance claims are under the exclusive jurisdiction of the F.C.C.).

Petitioners' claimed conflict between the decision below and a decision of a Court of Appeals – or any court – on the same matter does not exist.

II. THE PETITION MERELY REITERATES PETITIONERS' ARGUMENTS ON THE MERITS OF THEIR CASE, WHICH THE COURT BELOW COGENTLY AND CORRECTLY REJECTED.

Instead of attempting to demonstrate that there are "special and important reasons," Rule 10.1, for granting the petition, petitioners' argument presents the reasons why they believe the Federal Communications Act does not preempt their state law action to have respondents' transmission of FM radio signals declared a nuisance and to enjoin the alleged nuisance and be awarded damages therefor. When petitioners made the same argument to the lower court, it was correctly rejected.

In a soundly reasoned opinion, the lower court accepted petitioners' contention that this Court's opinion in *Cipollone, supra,* reaffirms the presumption against federal preemption of state law and acknowledged *Cipollone*'s emphasis on strict adherence to the scope of specific preemption provisions in legislation. (Pet. App. i, p. 4.) Unlike petitioners, however, the court below followed the further teaching of *Cipollone* that absent a specific preemption provision, it should turn to an implied preemption analysis, which required it:

> to determine whether [petitioners'] state law nuisance action actually conflicts with the Act or if [petitioners'] claim is necessarily displaced because the Act fully occupies the field.

(*Id.*, p. 5.) The Sixth Circuit concluded that, because there is an "irreconcilable conflict between the FCC's exercise of exclusive jurisdiction over the regulation of radio frequency interference and the imposition of common law

standards in a damage action," petitioners' action is preempted. (*Id.*)

The court below even addressed petitioners' concerns that if their nuisance action is preempted, they will lack a forum. The Sixth Circuit cited an F.C.C. decision, *In re Application of Calvary Educ. Broadcasting Network, Inc.*, 7 F.C.C.R. 4037 (1992), which illustrates for petitioners the appropriate procedure and remedies available for redressing their complaints about radio frequency interference through the F.C.C. and the FM Branch of the Mass Media Bureau. (Pet. App. i, pp. 6-7.)

The petition fails to identify any error in the lower court decision, just as it fails to show any reason why the decision should be reviewed by this Court.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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